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IN THE
Supreme Court of the United States
OCTOBER TERM, 1964

No. **2** 63

PHILIP R. CONSOLO, *Petitioner,*

v.

FEDERAL MARITIME COMMISSION,
UNITED STATES OF AMERICA,
and

FLOTA MERCANTE GRANCOLOMBIANA, S.A.
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE DISTRICT OF
COLUMBIA CIRCUIT

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TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statutes Involved	3
Statement of the Case	3
Reasons for Granting the Writ	6
Appendix A—Statutes Involved	1a
Appendix B—Opinion of the Court of Appeals	6a
Appendix C—Prior Opinion of the Court of Appeals .	20a
Appendix D—Decision of the Federal Maritime Board	38a
Appendix E—Decision of the Federal Maritime Com- mission on Remand	56a
Appendix F—Judgment of the Court of Appeals	72a

TABLE OF CASES

Baldwin v. Scott County Milling Co., 307 U.S. 478	10
Baltimore & O.R. Co. v. Brady, 288 U.S. 448	11
Banana Distributors v. Grace Line, 5 F.M.B. 278 (1957), remanded sub nom. Grace Line v. Federal Maritime Board, 263 F. 2d 709 (C.A. 2, 1959), on remand 5 F.M.B. 615 (1959), aff'd 280 F. 2d 790 (C.A. 2, 1960), cert. denied 364 U.S. 933	4
Philip R. Consolo v. Flota Mercante Grancolombiana, S.A., 5 F.M.B. 633 (1959), aff'd 112 App. D.C. 302 F. 2d 887 (1962)	4
Consolo v. Grace Line, 4 F.M.B. 293 (1953)	4
Roberto Hernandez, Inc. v. Arnold Bernstein, 116 F. 2d 849 (C.C.A. 2d, 1941)	7
Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc., 371 U.S. 84	9
Interstate Commerce Commission v. Atlantic Coast Line R. Co., 334 F. 2d 46 (C.A. 5, 1964), cert. granted January 18, 1965, 379 U.S. —, 85 S.Ct. 658	5, 7, 13

	Page
Meeker v. Lehigh Valley R. Co., 236 U.S. 412	7
Midland Valley R. Co. v. Excelsior Coal Co., 86 F. 2d 177 (C.C.A. 8th, 1936)	11
New Process Gear Corp. v. New York Central R. Co., 250 F. 2d 569 (C.A. 2, 1957), cert. denied 356 U.S. 959	13
Pennsylvania R. Co. v. Weber, 257 U.S. 85	11
D.L. Piazza v. West Coast Line, 210 F. 2d 947 (C.A. 2, 1954), cert. denied 348 U.S. 839	5
H.K. Porter Co. v. Central Vermont Railway, 366 U.S. 272	9
Southern Pacific Co. v. Darnell-Taenzler Lumber Co., 245 U.S. 531	11
St. Louis & S.F.R. Co. v. Spiller, 275 U.S. 156	10
Swayne & Hoyt v. Everett, 255 Fed. 71 (C.C.A. 9th, 1919)	8
Swayne & Hoyt v. United States, 300 U.S. 297	11
United States v. Interstate Commerce Commission, 337 U.S. 426	9
United States Navigation Co. v. Cunard S.S. Co., 284 U.S. 474	11

STATUTES

Administrative Orders Review Act of 1950 (Hobbs Act, 5 U.S.C. 1031 et seq.):

Section 1031, 5 U.S.C. 1031	2, 3, 6, 3a
Section 1032, 5 U.S.C. 1032	3, 9, 4a
Section 1039, 5 U.S.C. 1039	3, 4a
Section 1040, 5 U.S.C. 1040	2, 3, 4a

Interstate Commerce Act, 49 U.S.C. 1 et seq.

Section 16(2), 49 U.S.C. 16(2)	3, 5, 7, 5a
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Shipping Act, 1916, as amended, 46 U.S.C. 801 et seq.:

Section 14, 46 U.S.C. 812	2, 3, 4, 1a
Section 16, 46 U.S.C. 815	2, 3, 4, 1a
Section 22, 46 U.S.C. 821	3, 7, 1a
Section 29, 46 U.S.C. 828	3, 2a
Section 30, 46 U.S.C. 829	2, 3, 5, 6, 7, 8, 9, 2a
Section 31, 46 U.S.C. 830	3, 9, 3a

28 U.S.C. 1254	2
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OPINIONS BELOW

The opinion of the Court of Appeals (R. 694) is not yet reported. It is set forth as Appendix B hereto, pp. 6a-19a. The prior opinion of the Court of Appeals which remanded the case to the Federal Maritime Commission is reported in 112 App. D.C. 302, 302 F. 2d 887, and set forth as Appendix C hereto, pp. 20a-37a. The opinion of the Federal Maritime Board, which was

remanded by the prior Court of Appeals decision, is reported in 6 F.M.B. 262, and set forth herein as Appendix D, pp. 38a-55a. The opinion of the Federal Maritime Commission on remand is reported at 2 Pike and Fischer Shipping Regulation Reports 961. It is set forth herein as Appendix E, pp. 56a-71a.

JURISDICTION

The judgment of the Court of Appeals dismissing the petitions for review was entered on December 17, 1964. (R. 709; Appendix F, p. 72a). The jurisdiction of this Court is invoked under 5 U.S.C. § 1040 and 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Where the Federal Maritime Commission found that a common carrier by water had discriminated against a shipper by denying him space in violation of Sections 14 and 16 of the Shipping Act, 46 U.S.C. §§ 812, 815, and entered an order awarding reparation to the injured shipper:

1. Did the Court of Appeals have jurisdiction under the Administrative Orders Review Act of 1950 (the Hobbs Act), 5 U.S.C.A. § 1031 et seq., to review the reparation order on petition of the carrier, thus subjecting the shipper to a double set of judicial proceedings in enforcement of a reparation order, or was it required to relegate the carrier to the defense of a suit brought by the shipper in a district court under Section 30 of the Shipping Act, 46 U.S.C. § 829, thereby preserving the venue and other advantages which Section 30 affords to shippers?

2. Was the Court of Appeals correct in announcing a new standard for award of reparation: that the

Commission should find reparation to be "equitable" in addition to finding the carrier's discrimination to be unjust and unreasonable?

3. When the Commission upon remand found that award of reparation was equitable and found as a fact that the carrier's defenses were not bona fide, did the Court of Appeals apply a proper standard for review in setting aside the order by making its own contrary findings of fact?

STATUTES INVOLVED

The statutes involved are the Shipping Act, 1916, as amended, 46 U.S.C. 801 et seq. and the Administrative Orders Review Act of 1950 (Hobbs Act), 5 U.S.C. 1031 et seq. Also involved is the Interstate Commerce Act, 49 U.S.C. 1 et seq. Pertinent provisions of sections 14, 16, 22, 29, 30 and 31 of the Shipping Act; sections 1031, 1032, 1039, and 1040 of the Hobbs Act; and section 16(2) of the Interstate Commerce Act, are set forth in Appendix A hereto, pp. 1a-5a.

STATEMENT OF THE CASE

Petitioner Philip R. Consolo ("Consolo") is an independent importer of bananas; such independent importers depend on Ecuador as a source of supply. Flota Mercante Grancolombiana ("Flota") is a steamship line operating a regular common carrier service from Ecuador to United States Atlantic ports with vessels having refrigerated space suitable for carrying unripe bananas.

In early 1957 Flota knew that Consolo desired refrigerated space and had invited him to "bid" for space. The Federal Maritime Board, the agency then administering the Shipping Act, 1916, had twice held

that Flota's competitor on the route was obliged as a common carrier to allocate space fairly to all banana shippers.¹ Flota, without seeking advice or a ruling from the Federal Maritime Board, made an exclusive-dealing contract with another banana shipper, and denied Consolo any space.

Consolo filed a complaint with the Federal Maritime Board seeking (1) an order requiring Flota to allot him space and (2) reparation for the exclusion. After receiving warning that the complaint was about to be filed, Flota filed a petition for declaratory order with the Board.

After hearings, the Federal Maritime Board held that Flota's exclusion of Consolo was an unjust and unreasonable discrimination and violated Flota's duties as a common carrier under Sections 14 and 16 of the Shipping Act, 1916, 46 U.S.C. §§ 812, 815, ordered Flota to allocate its space fairly, and set a further hearing on reparation.² The Board's examiner found Consolo entitled to reparation in the amount of \$259,812.26. The Board's unanimous report on reparation reduced the award to \$143,370.98, and ordered Flota to pay (Appendix D, p. 55a). Flota did not pay.

Flota filed petitions for review in the Court of Appeals for the District of Columbia Circuit, claiming

¹ *Consolo v. Grace Line*, 4 F.M.B., 293 (1953); *Banana Distributors v. Grace Line*, 5 F.M.B. 278 (1957), remanded sub nom. *Grace Line v. Federal Maritime Board*, 263 F. 2d 709 (C.A. 2, 1959), on remand 5 F.M.B. 615 (1959), aff'd 280 F. 2d 790 (C.A. 2, 1960), cert. denied 364 U.S. 933.

² *Philip R. Consolo v. Flota Mercante Grancolombiana, S.A.*, 5 F.M.B. 633, 643 (1959).

that jurisdiction to review the Board's order finding violations of the Shipping Act and the reparation order existed under the Administrative Orders Review Act of 1950 (Hobbs Act), 5 U.S.C. 1031 et seq. Consolo filed a petition for review seeking to have the amount of the award increased.³

Consolo moved to dismiss Flota's petition for review of the reparation order on the ground that the Court of Appeals had no jurisdiction to review a reparation order on petition of a carrier. Consolo argued that Section 30 of the Shipping Act, 46 U.S.C. § 829, provides the exclusive procedure for enforcement of a reparation order by suit upon the order in a United States District Court where the Board's finding would be prima facie evidence. [This is the same jurisdictional question under the Hobbs Act as is raised under the Interstate Commerce Act by the Petition in *Interstate Commerce Commission v. Atlantic Coast Line R. Co., et al.*, No. 606 of this term, certiorari granted January 18, 1965, 379 U.S. —, 85 S.Ct. 658. The reparation procedure under the Shipping Act (46 U.S.C. § 829), is almost identical to that under the Interstate Commerce Act (49 U.S.C. § 16(2))].

The Court of Appeals: (1) affirmed the Board Report and Order finding Flota guilty of violating the Shipping Act (302 F. 2d at 891; Appendix C, pp. 29a-30a); (2) considered the jurisdictional question, finding it "not free from doubt or difficulty" (302 F. 2d at 894, Appendix C, p. 31a), and conceded that "A strong argument can be made that only one review should

³ Consolo's petition followed the holding in *D.L. Piazza v. West Coast Line*, 210 F. 2d 947 (C.A. 2, 1954, cert. denied 348 U.S. 839) that denials of reparation are reviewable under the Hobbs Act.

be permitted. . . ." (302 F. 2d at 894, Appendix C, p. 32a), but held that reparation orders are reviewable under the Hobbs Act (302 F. 2d at 894, Appendix C, pp. 32a-33a); and (3) announced (without citation of precedent), a new standard for reparation orders, holding that the Board should consider whether it would be "inequitable to force Flota to pay reparations"—remanding for such a determination (302 F. 2d at 896, Appendix C, p. 37a).

Upon remand, the Federal Maritime Commission, which by then had succeeded to the duties of the Federal Maritime Board, considered Flota's excuses for its conduct, and unanimously found: (1) that Flota's excuses were not bona fide; (2) that payment of reparation would be equitable; and (3) ordered Flota to pay reparation in the reduced amount of \$106,001.00. (Appendix E, p. 71a).

Flota again petitioned the District of Columbia Court of Appeals for review of the Commission's order. The Court purported to review the evidence, made its own findings as to what Flota "might reasonably have believed", (Appendix B, p. 13a), and "might have thought", (Appendix B, p. 15a), and directed the Commission to vacate its reparation order.

Consolo's suit under Section 30 of the Shipping Act, 46 U.S.C. § 829, in the United States District Court for the District of Maryland for enforcement of the Commission's award has not come to trial.

REASONS FOR GRANTING THE WRIT

1. This case presents an important and novel question as to jurisdiction to review Shipping Act reparation orders under the Administrative Orders Review Act of 1950 (Hobbs Act) 5 U.S.C. 1031, et seq.

A highly similar question as to jurisdiction to review reparation orders under the Interstate Commerce Act is presented in *Interstate Commerce Commission v. Atlantic Coast Line R. Co., et al.*, No. 606 of this term, certiorari granted January 18, 1965, 379 U.S. —, 85 S.Ct. 658.

The Shipping Act reparation provisions were modeled on the Interstate Commerce Act. Section 22 of the Shipping Act, 46 U.S.C. § 821, permits the agency to enter orders directing payment "of full reparation to the complainant for the injury caused by such violation" [of the Act]. If the carrier does not pay, Section 30 of the Shipping Act, 46 U.S.C. § 829, like Section 16(2) of the Interstate Commerce Act, 49 U.S.C. § 16(2), permits the injured shipper to bring suit in United States District Court in the District where he resides or where the carrier is found; makes the agency order "prima facie evidence of the facts therein stated"; excuses the shipper from payment of costs; and provides for award of "a reasonable attorney's fee" to a prevailing shipper.

Under both the Shipping Act and the Interstate Commerce Act, the long-established practice of carriers against whom reparation orders have been entered has been to await suit on the orders, and raise defenses in such suits: *Roberto Hernandez, Inc. v. Arnold Bernstein*, 116 F. 2d 849 (C.C.A. 2d, 1941) (Shipping Act); *Meeker v. Lehigh Valley R. Co.*, 236 U.S. 412, 422 (Interstate Commerce Act). This case is the first time a carrier has sought to multiply reviews under the Shipping Act; No. 606 is said to be the first case where carriers have sought to institute their own proceeding for review under the Interstate Commerce Act. Here, as in No. 606, the carrier's action deprives the injured shipper of the advantages of the explicit statu-

tory provisions as to venue and the statutory benefits of freedom from costs and payment of attorney's fees.

The Court of Appeals' holding here that it has jurisdiction to review a reparation order in advance of a District Court suit creates an intolerably long sequence of litigation for any shipper injured by a recalcitrant carrier. At common law, the remedy for a shipper denied space by an ocean carrier was swift and simple—the shipper sued the carrier: *Swayne & Hoyt v. Everett*, 255 Fed. 71 (C.C.A. 9th, 1919). The Shipping Act substituted a chain of litigation whereby the shipper first obtained an agency finding that the carrier had unjustly discriminated, then obtained an agency order for reparation, and then sued on the agency order under Section 30 of the Shipping Act in District Court.

The Court of Appeals, by claiming jurisdiction to review reparation orders under the Hobbs Act, would convert a difficult schedule of litigation into an intolerable one. If the Court of Appeals were right, an injured shipper must at a minimum: (1) file his complaint and succeed before the agency in proving a violation of the Shipping Act; (2) defend a favorable finding on review; (3) prove his entitlement to reparation; (4) then defend the reparation order on review by the Court of Appeals; (5) if still successful, file suit in District Court upon the reparation order; and (6) defend the District Court award on appeal. Such a procedure would mean in practice that the reparation provisions of the Shipping Act were repealed—as the Court of Appeals appears to have recognized (see Appendix B, Note 2, p. 10a). The Court of Appeals here denigrated the importance of reparation orders, saying: "The reparation provision . . . is not the ordinary mode for the Commission's regulation of

the shipping industry." (Appendix B, p. 9a). This Court, in contrast, has emphasized the importance of protecting shippers' rights to reparation: *United States v. Interstate Commerce Commission*, 337 U.S. 426;⁴ *Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc.*, 371 U.S. 84, 88.

In *United States v. Interstate Commerce Commission*, 337 U.S. 426, 440-43, this Court discussed in detail apportionment of duties between a single district judge and a three-judge statutory court in reviewing I.C.C. orders denying reparation. The Court held that reparation orders were for consideration of one judge, not a three-judge court. Originally, the Shipping Act, in Section 31, 46 U.S.C. § 830, called for three-judge review of agency orders *except reparation orders* which were governed by Section 30, 46 U.S.C. § 829. While the Hobbs Act (5 U.S.C. § 1032) now substitutes Court of Appeals review for three-judge review for such final orders "as are now subject to judicial review pursuant to the provisions of Section 830 of Title 46", the Hobbs Act says nothing as to reparation orders which remain subject to the special one-judge provisions of Section 829 of Title 46. The Court of Appeals, by claiming jurisdiction to review reparation orders in advance of suit upon such orders before a single judge, is thus in direct conflict with this Court's holding in *United States v. Interstate Commerce Commission*, 337 U.S. 426. It is also in direct conflict with this Court's statement in *H. K. Porter Co. v. Central Vermont Railway*, 366 U.S. 272, 274 at note 6, that reparation orders "can be challenged before a single judge under 49 U.S.C. § 16(2)."

⁴ The dissent in *United States v. Interstate Commerce Commission* also emphasizes that "Money damages are part of the regulatory scheme." 337 U.S. 426 at 458.

The Court of Appeals holding here is also in direct conflict with this Court's repeated explanations of the purpose of allowing attorney's fees in reparation suits:

"The purpose of Congress in making the provision concerning costs was to discourage harrassing resistance by a carrier to a reparation order."

St. Louis & S.F. R. Co. v. Spiller, 275 U.S. 156, 159, quoted and amplified in *Baldwin v. Scott County Milling Co.*, 307 U.S. 478, 482-83.

"Harrassing resistance" depriving the injured shipper of the benefits of the Congressional purpose has been the carrier's tactic here; it will be the tactic in all future cases if the decision below is allowed to stand. The jurisdictional question raised here is as important, or more important, to all future shippers by water carriers as the same question raised in No. 606 is to all shippers by rail.

2. The jurisdictional holding of the court below is hostile to the rights of injured shippers. Two additional holdings, one substantive and one procedural, are of equal—and disastrous—significance to all future shippers. Both of these holdings are of general future application; both are in conflict with the settled law of reparation announced and applied by this Court and the federal courts generally over the past half-century.

First, the Court of Appeals held that notwithstanding the agency's finding that the carrier's unjust and unreasonable discrimination had injured the shipper, before awarding reparation the agency must consider in addition "whether, under all the circumstances, it is inequitable to force Flota to pay reparations. . . ."

(302 F. 2d at 896, Appendix C, p. 37a.) This is a new substantive rule of law. It was unsupported by citation; the requirement of an "equitable" finding nowhere appears in the statute; and we believe such a rule is mentioned nowhere in any other reported reparation decision.

While the right of an agency to find a rate or practice unreasonable as to the future but not as to the past has been recognized, when an agency has found a rate or practice unreasonable as to the past, all previous cases have emphasized that reparation is due: *Roberto Hernandez, Inc. v. Arnold Bernstein*, 116 F. 2d 849 (C.C.A. 2d, 1941) (exclusion violating Shipping Act); *Midland Valley R. Co. v. Excelsior Coal Co.*, 86 F. 2d 177 (C.C.A. 8th, 1936) (railroad refusal to supply cars); *Baltimore & O. R. Co. v. Brady*, 288 U.S. 448 (unjust allocation of coal cars); *Pennsylvania R. Co. v. Weber*, 257 U.S. 85 (unjust allocation of coal cars); *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531 (overcharge).

Because the Shipping Act's reparation procedure is modeled on the Interstate Commerce Act, the decision below would apply to both statutes. *United States Navigation Co. v. Cunard S. S. Co.*, 284 U.S. 474, 480-82; *Swayne & Hoyt v. United States*, 300 U.S. 297, 303-4. Future injured shippers would not only have to prove a violation of the appropriate statute, and their damages, but also that payment would be "equitable". The injection of such a vague standard into the law of reparation would confer upon the regulatory agencies an excuse for denying redress not provided by Congress; it would permit all future carrier defendants to complicate further already complex reparation hearings; and, since there is no existing body of law as to when it is "equitable" to pay for illegal action, it

would leave agencies in all future cases without any established guides for decision.

The decision below works a fundamental change in the interpretation of statutes of major importance. The question whether a new barrier to the award of reparation can be suddenly discovered in the transportation statutes after a half century of litigation merits the urgent attention of this Court.

Second, when the court below returned the reparation award to the agency for "equitable" consideration, the language of the decision strongly implied that the agency, not the court, was to determine the "equities". (302 F. 2d at 896, Appendix C, p. 37a.) The Court of Appeals noted, and said it would follow, the usually-cited precedents restricting the scope of review (302 F. 2d at 894, Appendix C, p. 33a), and refused itself to decide the "equities." (302 F. 2d at 896, Appendix C, p. 37a).

Upon remand, the Federal Maritime Commission unanimously found that the carrier's excuses for excluding the shipper were not *bona fide* excuses, and unanimously held that payment of reparation would be equitable.

Thereupon, on second review, the Court of Appeals set aside the Commission's order because *it* (the Court of Appeals) found that the carrier "might reasonably have believed" or "might have thought in good faith" or "could reasonably have believed" in various excuses. (Appendix B, pp. 13a, 15a, 17a). The Court below did *not* hold that there was not substantial evidence to support the Commission's decision; instead, it said that there was "substantial evidence showing that it would be inequitable to assess damages against Flota. . . ." (Appendix B, p. 19a.) Again, no precedent was cited.

Thus, the Court below not only held that the statute contained a hitherto-unknown requirement of "equity"; it also held that the power to decide what was "equitable" lay in the Court, not in the agency. This doctrine is in flat conflict with all precedents dealing with review of reparation orders. It is, for example, in conflict with the decision in *New Process Gear Corp. v. New York Central R. Co.*, 250 F. 2d 569, 572 (C.A. 2, 1957), cert. denied 356 U.S. 959.

Prior to the decision below, the scope of review of reparation orders was well understood, and well understood to be limited. Thus, in *Interstate Commerce Commission v. Atlantic Coast Line R. Co.*, 334 F. 2d 46 (C.A. 5, 1964) (the case now under review as No. 606), the Court of Appeals argued in support of review prior to suit on an I.C.C. reparation order that (334 F. 2d at 49, note 12):

"All acknowledge that under the doctrine of primary jurisdiction the § 16(2) court may not independently determine the merits of the unjustice or unreasonableness of rates, discriminatory practices, and the like."

The trouble with the decision below in this case is not merely that it contravenes accepted rules for division of functions between courts and agencies. The Court below in this case has purported to find a new standard for agency grant of reparation ("equity") which escapes the otherwise-settled bounds of court review. Under the new standard, the Court below holds that the evidence is to be weighed by the reviewing Court, not the agency.⁵ Thus, a new and self-contained doc-

⁵ That the Court itself was weighing the evidence is clear: "... the Commission's determinations ignores ... the substantial weight of the evidence." (Appendix B, p. 9a).

trine has been announced, avoiding the accepted principle of review. This doctrine would be applicable to all future judicial review of reparation orders.

If the purported discoveries of both a new substantive standard in the statute and a new procedural power in the Courts of Appeals are in conflict with the decisions of this Court and other Federal courts—as Petitioner urges—then the conflicts are major, and merit this Court’s resolution. If, however, the established rules of judicial review are not applicable to the new “equity” doctrine, then there has been raised an equally important question of federal law, which should be, but has not been, settled by this Court.

CONCLUSION

The issues presented by the decision below involve questions of jurisdiction, substance, and procedure affecting all future reparation proceedings under the Shipping Act and the Interstate Commerce Act, which should be settled by this Court. The decision below is in conflict with applicable decisions and principles laid down by this Court and followed by other federal courts. For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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